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No. 88-1710

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS H. GREENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment was sufficient to charge petitioner with making false statements to influence the action of a federally insured bank, in violation of 18 U.S.C. 1014.

2. Whether petitioner was convicted of a crime not charged in the indictment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Armour Packing Co. v. *United States*, 209 U.S. 56 (1908)	6
Hamling v. *United States*, 418 U.S. 87 (1974)	6
Russell v. *United States*, 369 U.S. 749 (1962)	8
United States v. *Bailey*, 444 U.S. 394 (1980)	6
United States v. *Baity*, 489 F.2d 256 (5th Cir. 1973)	5
United States v. *Berlin*, 472 F.2d 1002 (2d Cir.), cert. denied, 412 U.S. 949 (1973)	8
United States v. *Debrow*, 346 U.S. 374 (1953)	6
United States v. *Gardner*, 681 F.2d 733 (11th Cir. 1982)	5
United States v. *Goberman*, 458 F.2d 226 (3d Cir. 1972)	5
United States v. *Hess*, 124 U.S. 483 (1888)	6
United States v. *Hooker*, 841 F.2d 1225 (4th Cir. 1988)	8
United States v. *Kindig*, 854 F.2d 703 (5th Cir. 1988)	5
United States v. *Pupo*, 841 F.2d 1235 (4th Cir.), cert. denied, 109 S. Ct. 113 (1988)	8
United States v. *Stoddart*, 574 F.2d 1050 (10th Cir. 1978)	5
United States v. *Wabaunsee*, 528 F.2d 1 (7th Cir. 1975)	8
United States v. *Zangger*, 848 F.2d 923 (8th Cir. 1988)	8
Williams v. *United States*, 458 U.S. 279 (1982)	5

Statute and rule:

18 U.S.C. 1014	2, 3, 4, 5, 6, 7
Fed. R. Crim. P.:	
Rule 7(c)	6
Rule 7(c)(1)	6

Miscellaneous: Page

1 C. Wright, *Federal Practice and Procedure* (2d ed. 1982) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 862 F.2d 1512. The opinion of the district court (Pet. App. A18-A24) is reported at 670 F. Supp. 337.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1989. A petition for rehearing was denied on February 22, 1989. Pet. App. A13. The petition for a writ of certiorari was filed on April 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was con-

victed on four counts of making a false statement to a federally insured bank, in violation of 18 U.S.C. 1014. He was sentenced to a total of four years' imprisonment and a $25,000 fine. The court of appeals affirmed. Pet. App. A1-A13; Gov't C.A. Br. 3.

1. The evidence at trial on Counts 1 through 3, which is not in dispute, showed that petitioner, an attorney, was indebted to the Flagship Bank of Jacksonville, Florida. By 1979, the bank had twice sued petitioner and had obtained two judgments against him, including one in the amount of $123,413.58. In 1984, the Sun Bank acquired Flagship. In reviewing Flagship's records, Sun Bank officers learned that petitioner had made no payments on his outstanding judgments. In April, May, and June 1984, petitioner contacted a bank officer to resolve the issue of the outstanding judgments. On each occasion, petitioner made misrepresentations with respect to his personal finances in an effort to avoid paying the $123,413.58 judgment. Gov't C.A. Br. 4-10.

The evidence concerning Count 4 showed that during May and July 1984, petitioner submitted a fraudulent application for a $170,000 loan to the Peoples National Bank in New York. See Gov't Exh. 49A, included in Pet. C.A. App. When the loan was not made, petitioner's agent, Leslie Erber, submitted the application to the Marine Midland Bank in New York. Erber told petitioner about the submission, and petitioner approved it. Based on that application, Marine Midland issued the loan. Pet. App. A7, A9-A13; Gov't C.A. Br. 42.

2. The bank false statement statute, 18 U.S.C. 1014, makes it an offense for any person knowingly to make a false statement for the purpose of influencing a federal bank "upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by

renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor." Counts 1 through 3 of the four-count indictment against petitioner involved petitioner's false statements to the Sun Bank. Each of those counts alleged that petitioner "knowingly and willfully did make materially false statements in connection with a request and application to settle an outstanding judgment of $123,413.58, obtained by Flagship Bank of Jacksonville against him" with the intent of influencing the action of the Sun Bank. Pet. App. A14-A16. Count 4 alleged that petitioner "knowingly and willfully did make and cause to be made materially false statements in connection with an application for a $170,000 loan" with the intent of influencing the action of the Marine Midland Bank. Pet. App. A17.

Prior to trial, petitioner moved to dismiss the first three counts of the indictment on the ground that they did not state an offense. He argued that Section 1014 did not reach false statements made in connection with negotiating sessions to settle a judgment owed to a bank. Petitioner conceded that the judgment at issue was based on a loan from the bank (Def's Mem. in Support of Def's Mot. to Dismiss Indictment 5; Def's Mem. in Support of Def's Mot. to Dismiss Superseding Indictment 2-3); and he did not contest the sufficiency of the indictment on the ground that it should have specified the source of the judgment. The district court denied the motion. Pet. App. A18-A23. The jury convicted petitioner on all four counts.

3. The court of appeals affirmed. Pet. App. A1-A13. First, it concluded that Section 1014 reached the false statements petitioner had made to influence settlement negotiations on the judgment debt arising from his defaulted loan from the bank. Pet. App. A2-A6. The court observed that Section 1014 has been construed broadly, to include false statements made after a bank

loan had issued, when the false statements were made in order to delay civil litigation. Pet. App. A5-A6. The court then ruled that "[t]here is no logical basis for a distinction between making misstatements to a bank to delay litigation and making misstatements to obtain a favorable settlement after judgment." Pet. App. A6. The court also rejected petitioner's contention that the indictment was fatally defective because it referred only to petitioner's judgment debt instead of referring to a "judgment debt arising from a defaulted loan." In the court's view, the indictment was sufficently clear and definite. Pet. App. A6 n.4.

The court of appeals next concluded that the evidence was sufficient to sustain petitioner's conviction for submitting a fraudulent loan application to the Marine Midland Bank (Count 4). Although the court recognized that it was petitioner's agent who actually submitted the application to Marine Midland Bank, the court noted that the evidence showed that petitioner ratified the agent's act and that petitioner intended to defraud that bank. Pet. App. A9-A13.

ARGUMENT

1. Petitioner contends first (Pet. 9-20) that Counts 1 through 3 of the indictment, which charged him with making false statements during his settlement negotiations with the bank, failed to state an offense. Specifically, he argues that Section 1014 does not reach the making of false statements during negotiations to settle a judgment on a defaulted bank loan. Furthermore, he claims that the indictment was fatally vague because it did not allege that the judgment against him related to a defaulted bank loan. Neither contention has merit.

Section 1014 is very broad: it reaches a false statement made in connection with any "application * * * commitment, or loan." In *Williams* v. *United States*, 458 U.S. 279, 288-289 (1982), this Court stated that Section 1014 reaches false statements "made in connection with conventional loan or related transactions."[1] See *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978) ("The purpose of § 1014 was to cover all undertakings which might subject the FDIC insured bank to risk of loss."). The courts of appeals have held that Section 1014 reaches false statements made to a bank for the purpose of influencing bank action in connection with a bank loan even after the defendant has obtained the loan. See *United States* v. *Kindig*, 854 F.2d 703, 706 (5th Cir. 1988); *United States* v. *Gardner*, 681 F.2d 733 (11th Cir. 1982); *United States* v. *Baity*, 489 F.2d 256, 257 (5th Cir. 1973). Cf. *United States* v. *Goberman*, 458 F.2d 226, 229 (3d Cir. 1972) (Section 1014 does not apply only to those "false statements which are actually used in the decision to make a loan," but to all statements "which have the capacity to influence" the federal lending institution). In *Gardner*, the court held that Section 1014 reaches the conduct of a person who made a false statement to a bank to prevent it from filing a civil suit to recover an overpayment previously made to him. As the court of appeals explained here (Pet. App. A6), there is no relevant difference between the *Gardner* situation and this case, where petitioner's false statements were made after the bank obtained a judgment against petitioner following his default. Thus, the court of appeals

[1] The *Williams* case concerned "check kiting," an offense the Court determined not to fall under Section 1014 because depositing checks that were not supported by sufficient funds does not involve either the making of a false statement or the overvaluing of any property or security.

correctly concluded that petitioner's conduct fell within Section 1014.

Petitioner's attack on the indictment is equally without merit. Under Fed. R. Crim. P. 7(c)(1), an indictment need only be a "plain, concise and definite written statement of the essential facts constituting the offense charged. * * * It need not contain * * * any other matter not necessary to such statement." Rule 7(c) was "designed to eliminate technicalities" and is "to be construed to secure simplicity in procedure." *United States* v. *Debrow*, 346 U.S. 374, 376 (1953). An indictment is ordinarily sufficient if it contains the elements of the offense, fairly informs the defendant of the charge, and enables him to avoid a future prosecution for the same offense on double jeopardy grounds. *United States* v. *Bailey*, 444 U.S. 394, 414 (1980); *Hamling* v. *United States*, 418 U.S. 87, 117-118 (1974). To meet this standard, the language of the statute may be used in the description of an offense, provided that it is " 'accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.' " *Hamling*, 418 U.S. at 117-118 (quoting *United States* v. *Hess*, 124 U.S. 483, 487 (1888)).[2]

The indictment in this case met that standard. First, Counts 1 through 3 tracked the language of Section 1014 by alleging that petitioner made his false statements in

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[2] As this Court has put it, "the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense." *Armour Packing Co.* v. *United States*, 209 U.S. 56, 84 (1908). Such a situation may occur, for example, where criminal intent is an element of a crime but is not mentioned in the statute. See 1 C. Wright, *Federal Practice and Procedure* § 125, at 375-377 & n.39 (2d ed. 1982) (citing cases).

connection with a request and "application" to settle the $123,413.58 judgment obtained against him by the bank. Thus, the indictment explicitly stated every essential element of the offense.[3] Second, by identifying the amount of the judgment and by stating that the judgment had been obtained by the bank, the indictment clearly indicated that the debt at issue was the product of petitioner's defaulted bank loan.[4] Finally, the indictment was sufficiently specific, particularly when considered along with rest of the record, to ensure that petitioner could avoid a second

[3] Contrary to petitioner's contention (Pet. 15), the indictment did not have to specify that the debt involved a defaulted bank loan. While the parties could, and did, litigate the scope of Section 1014, there is no requirement that an indictment must incorporate all interpretations of a provision supported by the case law. Although the court of appeals characterized the nature of the debt underlying the judgment as "an essential element of the case" (Pet. App. A6 n.4), that merely meant that in the court's view the judgment had to arise from a loan in order for the judgment to be within the reach of Section 1014. It did not mean that the origin of the judgment—a matter of the court's interpretation of the statutory language—had to be included in the charging language in order for the indictment to state an offense.

[4] The district court did not err in instructing the jury (Pet. App. A3) that false statements to a federally insured bank during negotiations to settle "a judgment" could constitute a crime under 18 U.S.C. 1014. See Pet. 15. The scope of the statute was a question of law for the court, and both the district court and the court of appeals correctly determined that the statute covered an application to settle a judgment debt based on a defaulted loan to a bank. Even if the statute covers only those "judgments" that are based on defaulted loans to a bank, the district court's instruction concerning "a judgment" was not misleading, because the only evidence before the jury concerned a judgment debt which, as petitioner repeatedly had conceded (see Def's Mem. in Support of Def's Mot. to Dismiss the Indictment 5; Def's Mem. in Support of Def's Mot. to Dismiss the Superseding Indictment 2-3; see also Pet. C.A. Br. 8, 28), stemmed from a defaulted bank loan.

prosecution for the same offense. See, *e.g.*, *Russell* v. *United States*, 369 U.S. 749, 764 (1962).

The decision below does not conflict with any decision of this Court or with the decision of any other court of appeals. For example, in *United States* v. *Hooker*, 841 F.2d 1225 (4th Cir. 1988) (en banc), the court held only that an indictment that charged the offense of conspiracy to commit racketeering was fatally defective because it failed to charge the interstate commerce element of the racketeering statute. The other cases cited by petitioner likewise stand for the proposition that an indictment must state each statutory element of a charged offense, or that an indictment lacking an essential allegation is not cured by a citation to the charged statute.[5] In this case, by contrast, the indictment alleged each statutory element of the charged offense.

2. There is no merit to petitioner's final contention (Pet. 20-22) that he may have been convicted of an offense that was not charged in the indictment. Count 4 of the indictment clearly alleged that petitioner made false statements "with intent to and for the purpose of influencing the action of the Marine Midland Bank." Pet. App. A17. That allegation matched the special verdict form on which the jury convicted petitioner, and the evidence supported that conviction. As the court of appeals explained (Pet. App. A9-A13), the evidence showed that although petitioner did not actually submit the fraudulent applica-

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[5] See, *e.g.*, *United States* v. *Zangger*, 848 F.2d 923 (8th Cir. 1988) (indictment failed to allege that mailed matter was "obscene"); *United States* v. *Pupo*, 841 F.2d 1235 (4th Cir.), cert. denied, 109 S. Ct. 113 (1988) (indictment failed to allege that acts were done "knowingly" or "intentionally"); *United States* v. *Wabaunsee*, 528 F.2d 1 (7th Cir. 1975) (indictment failed to allege requisite knowledge); *United States* v. *Berlin*, 472 F.2d 1002 (2d Cir.), cert. denied, 412 U.S. 949 (1973) (same).

tion to the Marine Midland Bank, petitioner ratified the action of an agent who did in fact submit the application to that bank. The indictment did not charge, and the jury was not asked to find, that petitioner committed the separate crime of making a false application to the Peoples National Bank. Petitioner was therefore not convicted of a crime other than the one charged in the indictment.

Nor did the district court's instructions introduce any improper ambiguity with respect to Count 4. The court correctly instructed the jury that a defendant need not know, when he submits a false application, "what particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank." See Pet. 21. That instruction was clearly correct, and it did not make it possible for the jury to convict petitioner based on his application to the Peoples National Bank. The indictment and the special verdict form ensured that the jury in fact convicted petitioner of the crime charged in the indictment—submitting a false statement to the Marine Midland Bank.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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